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6 **UNITED STATES DISTRICT COURT**  
7 **DISTRICT OF NEVADA**  
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9 ALFONSO MANUEL BLAKE, )

10 Petitioner, )

11 vs. )

12 RENEE BAKER, *et al.*, )

13 Respondents. )

3:09-cv-00327-RCJ-WGC

**ORDER**

14 \_\_\_\_\_/

15 Respondents have filed a motion to dismiss (ECF No. 130) with respect to petitioner's second  
16 amended petition for writ of habeas corpus (ECF No. 124). Respondents argue that claims in the  
17 petition are unexhausted, procedurally barred, and/or not cognizable in a federal habeas proceeding.<sup>1</sup>  
18 In relation to respondents' motion to dismiss, petitioner has filed a motion for evidentiary hearing.  
19 ECF No. 141. This order decides both motions.

20 **I. Background**

21 In March 2004, a jury sitting in the Clark County Eighth Judicial District Court found Blake  
22 guilty of two counts of first-degree murder with the use of a deadly weapon and returned a sentence  
23 of death. The jury also found Blake guilty of attempted murder with the use of a deadly weapon, for  
24 which he was sentenced to two consecutive terms of 96 to 240 months in prison.

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26 <sup>1</sup> Respondents have withdrawn additional argument that certain claims in the second amended  
petition are untimely. ECF No. 150, p. 10.

1 On direct appeal, the Nevada Supreme Court affirmed the convictions and sentences in a  
2 decision issued in October 2005. *Blake v. State*, 121 P.3d 567 (Nev. 2005). Blake initiated state  
3 post-conviction proceedings on June 22, 2006. In May 2007, with the assistance of appointed  
4 counsel, he filed a supplemental petition. Without holding an evidentiary hearing, the state district  
5 court denied relief with a decision entered in October 2007. Blake appealed. In February 2009, the  
6 Nevada Supreme Court affirmed the lower court. *Blake v. State*, 2009 WL 1491366 (Nev.).

7 On June 24, 2009, Blake initiated this federal habeas proceeding. On March 4, 2010, he filed  
8 an amended petition for writ of habeas corpus. The following month, he initiated a second state post-  
9 conviction proceeding. On November 2, 2010, this court denied Blake's motion for stay and  
10 abeyance and granted, in part, respondents' motion to dismiss his petition on exhaustion grounds.  
11 When Blake refused to abandon unexhausted claims, this court dismissed this case without prejudice  
12 pursuant to *Rose v. Lundy*, 455 U.S. 509 (1982).

13 On September 26, 2011, the state district court dismissed Blake's second state post-  
14 conviction petition as procedurally barred. On March 14, 2014, the Ninth Circuit Court of Appeals  
15 reversed this court's dismissal of Blake's federal petition and remanded this case with instructions to  
16 grant the stay and abeyance. *Blake v. Baker*, 745 F.3d 977, 984 (9<sup>th</sup> Cir.), *cert. denied*, 135 S. Ct.  
17 128 (2014).

18 On July 30, 2014, the Nevada Supreme Court affirmed the lower court's dismissal of Blake's  
19 second state petition. On October 29, 2014, Blake filed a status report in this case indicating that his  
20 state court proceedings had concluded. On July 8, 2015, Blake filed the second amended petition for  
21 writ of habeas corpus that is the subject of respondents' motion to dismiss.

## 22 **II. Motion to Dismiss**

### 23 *1. Exhaustion of Claim Fourteen*

24 Respondents argue that Claim Fourteen of Blake's second amended petition is partially  
25 unexhausted. In that claim Blake alleges that his death sentence violates his constitutional rights  
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1 because execution by lethal injection is cruel and unusual punishment and because Nevada's current  
2 execution protocol is cruel and unusual punishment.

3 A federal court will not grant a state prisoner's petition for habeas relief until the prisoner has  
4 exhausted his available state remedies for all claims raised. *Rose v. Lundy*, 455 U.S. 509 (1982); 28  
5 U.S.C. § 2254(b). A petitioner must give the state courts a fair opportunity to act on each of his  
6 claims before he presents those claims in a federal habeas petition. *O'Sullivan v. Boerckel*, 526 U.S.  
7 838, 844 (1999); *see also Duncan v. Henry*, 513 U.S. 364, 365 (1995). A claim remains unexhausted  
8 until the petitioner has given the highest available state court the opportunity to consider the claim  
9 through direct appeal or state collateral review proceedings. *See Casey v. Moore*, 386 F.3d 896, 916  
10 (9<sup>th</sup> Cir. 2004); *Garrison v. McCarthy*, 653 F.2d 374, 376 (9<sup>th</sup> Cir. 1981).

11 A habeas petitioner must "present the state courts with the same claim he urges upon the  
12 federal court." *Picard v. Connor*, 404 U.S. 270, 276 (1971). To achieve exhaustion, the state court  
13 must be "alerted to the fact that the prisoner [is] asserting claims under the United States  
14 Constitution" and given the opportunity to correct alleged violations of the prisoner's federal rights.  
15 *Duncan v. Henry*, 513 U.S. 364, 365 (1995); *see Hiivala v. Wood*, 195 F.3d 1098, 1106 (9<sup>th</sup> Cir.  
16 1999). A claim is not exhausted unless the petitioner has presented to the state court the same  
17 operative facts and legal theory upon which his federal habeas claim is based. *Bland v. California*  
18 *Dept. of Corrections*, 20 F.3d 1469, 1473 (9<sup>th</sup> Cir. 1994).

19 Respondents argue that Blake has added legal theories to Claim Fourteen that have not been  
20 presented to the state court – i.e., that his death sentence is invalid under constitutional guarantees of  
21 freedom of information and a reliable sentence and violates the First and Fifth Amendment. It  
22 appears, however, as if Blake merely added these theories to the heading of Claim Fourteen. There  
23 are no allegations within the body of the claim indicating how he is entitled to relief under those  
24 theories. Thus, the court may deny relief on the merits notwithstanding Blake's failure to present the  
25 theories to the Nevada Supreme Court. *See* 28 U.S.C. § 2254(b)(2); *Cassett v. Stewart*, 406 F.3d  
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1 614, 623–24 (9<sup>th</sup> Cir. 2005).

2 Respondents also argue that Claim Fourteen includes unexhausted allegations that Nevada  
3 lacks the means to carry out Blake’s execution and that an execution in violation of the Eighth  
4 Amendment is prejudicial *per se*. In particular, Blake alleges that one of the three drugs prescribed by  
5 Nevada’s execution protocol, sodium thiopental, is unavailable and that Nevada’s execution chamber  
6 is deficient in several regards and unusable for its designated purpose. Blake did not raise these  
7 allegations in state court. Even so, this court does not agree that his failure to do so renders Claim  
8 Fourteen unexhausted. *See Vazquez v. Hillery*, 474 U.S. 254, 260 (1986) (holding that supplemental  
9 evidence presented for the first time in federal court did not fundamentally alter the legal claim  
10 presented to the state courts so as to render the claim unexhausted). The court reserves judgment,  
11 however, as to whether evidence not presented in the state court may be considered in ruling upon  
12 the merits of Claim Fourteen.<sup>2</sup>

## 13 2. Procedural Default

14 Respondents contend that Claims One, Two(B-F), Four, Five(A-F) and (H-J), Six(A, B, D,  
15 E), Seven(B, C, D1.2, D2, F, H, I, K), and Nine through Thirteen (except for Claims Nine(F) and  
16 Twelve(A)) are procedurally barred and that Claims Two(A), Three, Five(G), Seven(A, D1.1, D1.3,  
17 E, J), Nine(F), and Twelve(A) are procedurally barred in part.

18 A “procedural default” occurs when a petitioner presents a federal law claim for habeas  
19 corpus relief to the state courts but the state courts dispose of the claim on procedural grounds  
20 instead of on the merits. A federal court will not review the claim if the decision of the state court  
21 regarding that claim rested on a state law ground that is independent of the federal question and  
22 adequate to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 730–31 (1991).

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24 <sup>2</sup> As for the allegation that an execution in violation of the Eighth Amendment is prejudicial *per*  
25 *se*, it is surplusage. A finding that Blake’s death sentence violates the Eighth Amendment would entitle  
26 him to habeas relief. Thus, the allegation is unnecessary and does not impact the exhaustion status of  
Claim Fourteen.

1 The *Coleman* Court stated the effect of a procedural default, as follows:

2 In all cases in which a state prisoner has defaulted his federal claims in state court  
3 pursuant to an independent and adequate state procedural rule, federal habeas review  
4 of the claims is barred unless the prisoner can demonstrate cause for the default and  
actual prejudice as a result of the alleged violation of federal law, or demonstrate that  
failure to consider the claims will result in a fundamental miscarriage of justice.

5 *Coleman*, 501 U.S. at 750; *see also Murray v. Carrier*, 477 U.S. 478, 485 (1986).

6 A state procedural bar is "independent" if the state court explicitly invokes the procedural rule  
7 as a separate basis for its decision. *McKenna v. McDaniel*, 65 F.3d 1483, 1488 (9<sup>th</sup> Cir.1995). A  
8 state court's decision is not "independent" if the application of a state's default rule depends on a  
9 consideration of federal law. *Park v. California*, 202 F.3d 1146, 1152 (9<sup>th</sup> Cir. 2000). Also, if the  
10 state court's decision fails "to specify which claims were barred for which reasons," the Ninth Circuit  
11 has held that the ambiguity may serve to defeat the independence of the state procedural bar. *Valerio*  
12 *v. Crawford*, 306 F.3d 742, 775 (9<sup>th</sup> Cir. 2002); *Koerner v. Grigas*, 328 F.3d 1039, 1050 (9<sup>th</sup> Cir.  
13 2003).

14 A state procedural rule is "adequate" if it is "clear, consistently applied, and well-established at  
15 the time of the petitioner's purported default." *Calderon v. United States Dist. Court*, 96 F.3d 1126,  
16 1129 (9<sup>th</sup> Cir.1996) (citation and internal quotation marks omitted). The State carries the initial  
17 burden of adequately pleading "the existence of an independent and adequate state procedural ground  
18 as an affirmative defense." *Bennett v. Mueller*, 322 F.3d 573, 586 (9<sup>th</sup> Cir. 2003). The burden then  
19 shifts to the petitioner "to place that defense in issue," which the petitioner may do "by asserting  
20 specific factual allegations that demonstrate the inadequacy of the state procedure, including citation  
21 to authority demonstrating inconsistent application of the rule." *Id.* Assuming the petitioner has met  
22 his burden, "the ultimate burden" of proving the adequacy of the state bar rests with the State, which  
23 must demonstrate "that the state procedural rule has been regularly and consistently applied in habeas  
24 actions." *Id.*

25 Respondents argue that the grounds noted above are procedurally barred because Blake did  
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1 not present them to the state court until his second state post-conviction proceeding wherein the  
2 Nevada Supreme Court barred the claims as untimely and successive under Nev. Rev. Stat. §§ 34.726  
3 and 34.810, respectively.<sup>3</sup> Under Nev. Rev. Stat. § 34.726(1), a petition is untimely if filed later than  
4 one year after the entry of the judgment of conviction or, if an appeal has been taken from the  
5 judgment, within one year after the Nevada Supreme Court issues its remittitur. Nev. Rev. Stat. §  
6 34.810 addresses successive petitions and requires dismissal of claims that have already been raised  
7 and adjudicated on the merits, as well as claims that could have been raised in an earlier proceeding,  
8 but were not. The Nevada Supreme Court rejected Blake's arguments that he could show cause and  
9 prejudice to overcome the procedural bars.

10 In response to respondents' assertion of procedural default, Blake challenges the adequacy of  
11 Nev. Rev. Stat. § 34.810 as a procedural bar and "does not concede" that Nev. Rev. Stat § 34.726 is  
12 adequate. With respect to the latter, Blake does not assert any specific factual allegations showing  
13 inadequacy, thus, he has failed to carry his burden under *Bennett*. Accordingly, this court concludes  
14 that Nev. Rev. Stat. § 34.726 was a "clear, consistently applied, and well-established" procedural rule  
15 at the time of Blake's default. *See Loveland v. Hatcher*, 231 F.3d 640, 643 (9<sup>th</sup> Cir. 2000)  
16 (recognizing the adequacy of Nevada's procedural time bar).

17 With regard to the adequacy of Nev. Rev. Stat. § 34.810, Blake cites the Ninth Circuit's  
18 decision in *Valerio v. Crawford*, 306 F.3d 742 (9<sup>th</sup> Cir. 2002), where the court held that Nevada's  
19 successive petition bar is inadequate to bar federal review in capital cases. *See Valerio*, 306 F.3d at  
20 777–78. By citing to *Valerio*, he has carried his burden under *Bennett*; and the burden "shifts back to  
21 the government to demonstrate that the law has subsequently become adequate." *King v. LaMarque*,

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23 <sup>3</sup> Arguing that the claim was unexhausted, respondents did not assert procedural default with  
24 respect to Claim Fourteen. Because the claim was not presented until Blake's second state post-  
25 conviction proceeding, it is a claim to which these procedural bars were applied. Respondents are  
26 permitted to raise the defense in their answer if they so choose. *See Morrison v. Mahoney*, 399 F.3d  
1042, 1046 (9<sup>th</sup> Cir. 2005) (motion to dismiss in habeas is not a responsive pleading that required the  
state to raise or waive all of its defenses).

1 464 F.3d 963, 967 (9<sup>th</sup> Cir. 2006).

2 Respondents argue that *Valerio* is irreconcilable with the Supreme Court's subsequent  
3 decisions in *Beard v. Kindler*, 558 U.S. 53 (2009), and *Walker v. Martin*, 562 U.S. 307 (2011),  
4 because the Supreme Court in those cases rejected the notion that a state court's discretionary  
5 application of procedural rule will necessarily render it an inadequate ground to bar federal review. In  
6 *Valerio*, the court noted a handful of capital cases in which the Nevada Supreme Court bypassed  
7 Nev. Rev. Stat. § 34.810 to reach the merits of a capital petitioner's claim(s). *Valerio*, 306 F.3d 776-  
8 77. Relying on those cases, the court of appeals concluded that the Nevada Supreme Court  
9 "exercised a general discretionary power" to address the merits of defaulted claims and, on that basis,  
10 determined that Nev. Rev. Stat. § 34.810 was not an adequate bar to federal review. *Id.* at 778.

11 The reasoning in *Valerio* has certainly been called into question by *Beard* and *Walker*. *See*  
12 *Beard*, 558 U.S. at 60-61 (holding that a discretionary state procedural rule can serve as an adequate  
13 ground to bar federal habeas review," because it can be considered "firmly established") and *Walker*,  
14 562 U.S. at 320 (explaining that a rule is not automatically inadequate "upon a showing of seeming  
15 inconsistencies" and that state court must be allowed discretion "to avoid the harsh results that  
16 sometimes attend consistent application of an unyielding rule"). But even if *Valerio* has not been  
17 overruled, respondents have nonetheless carried their "ultimate burden" under *Bennett*.

18 The court in *Valerio* found that the bar was inadequate as of 1990. *Valerio*, 306 F.3d at 778.  
19 Because the analysis focuses on the time the purported default occurred and not when a state court  
20 actually applies the bar, respondents must show that Nev. Rev. Stat. § 34.810 had become clear,  
21 consistently applied, and well-established by the time of Blake filed his counseled supplemental  
22 petition in his first state post-conviction proceeding (May 2007). *See Petrocelli v. Angelone*, 248  
23 F.3d 877, 886 (9<sup>th</sup> Cir.2001) (citing *Fields v. Calderon*, 125 F.3d 757, 760-62 (9<sup>th</sup> Cir.1997)). In  
24 *Nevada v. Eighth Judicial District (Riker)*, 112 P.3d 1070 (Nev. 2005), a capital habeas case, the  
25 Nevada Supreme Court affirmed the "mandatory" nature of its procedural rules, including Nev. Rev  
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1 .Stat. § 34.810. *Riker*, 112 P.3d at 1077-82. In addition, respondents cite to numerous capital cases  
2 subsequent to *Riker* in which the Nevada Supreme Court has barred claims pursuant to Nev. Rev.  
3 Stat. § 34.810. See ECF No. 150, p. 20-21. Thus, respondents have shown that, by May 2007,  
4 Nevada's successive petition bar had become a "clear, consistently applied, and well-established"  
5 procedural rule in capital cases.

6 Having concluded that the procedural rules the Nevada Supreme Court imposed in Blake's  
7 second state habeas proceeding are, as a general matter, adequate to bar federal review, the court  
8 turns to Blake's arguments that certain claims are not procedurally defaulted. Blake contends that  
9 Claims Five(G), Seven (D1.3), (J in part), Nine(F), and Twelve(A) are not procedurally defaulted  
10 because they were reviewed on the merits by the Nevada Supreme Court either in his direct appeal or  
11 in his first state post-conviction proceeding.

12 With respect to Claims Five(G), Nine(F), and Twelve(A), respondents do not dispute that the  
13 core legal and factual allegations contained in these claims were presented to the Nevada Supreme  
14 Court and the Nevada Supreme Court adjudicated those claims on the merits. As previously noted by  
15 this court, however, Blake, in his second amended federal petition, included legal theories in relation  
16 to these claims that were not presented in Blake's direct appeal or in his first state post-conviction  
17 proceeding. ECF No. 77, p. 3-5.<sup>4</sup> Thus, these claims are not procedurally defaulted, but only as to  
18 legal theories identified as exhausted in the court's previous order – i.e., ECF No. 77.

19 Similarly, Blake partially exhausted Claim Seven (D1.3), a challenge based on the trial court's  
20 failure to prevent the use of peremptory strikes of death-scrupled jurors, in the direct appeal of his  
21 conviction and sentence. ECF No. 43-18, p. 24-28. Thus, to the extent that he claims a violation of  
22 his right to due process, a fair trial, an impartial jury, effective assistance of counsel, and to be free  
23 from cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments, Claim  
24 Seven (D1.3) is not procedurally defaulted. The claims is procedurally defaulted only to the extent he

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25 <sup>4</sup> References to page numbers for ECF documents are based on ECF pagination.  
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1 seeks relief under other legal theories. Claim Seven(J) raises the same allegation as Claim  
2 Seven(D1.3), but combines it with an allegation that the court also erred by denying two other  
3 motions related to jury selection. Thus, Claim Seven(J) is not procedurally defaulted only to the  
4 extent that it is redundant of Claim Seven(D1.3).

5 Blake also contends that Claims Two(E), Five(J), Seven(K), Nine(I), and Thirteen are not  
6 procedurally defaulted because, as cumulative error claims, the court is duty-bound to consider them.  
7 Claim Thirteen is a claim that the combined prejudice of errors alleged throughout his entire petition  
8 deprived him of a fair trial in violation of his constitutional rights. The other four “claims” are  
9 allegations of combined prejudice arising from the type of error alleged within that particular section.<sup>5</sup>

10  
11 With respect to the latter, this court agrees that it must consider the combined prejudicial  
12 impact of multiple errors in determining whether to grant relief. *See Killian v. Poole*, 282 F.3d 1204,  
13 1211 (9<sup>th</sup> Cir. 2002) (holding that even if no single error were prejudicial, the cumulative effect of  
14 several substantial errors may be sufficiently prejudicial as to require reversal). In conducting such an  
15 analysis, however, the court shall consider only claims of error that are not procedurally barred.

16 As for Claim Thirteen, a claim of cumulative error must distinctly be raised as an issue at the  
17 state level for purposes of exhaustion before seeking federal habeas review. *See Solis v. Garcia*, 219  
18 F.3d 922, 930 (9<sup>th</sup> Cir. 2000) (the district court properly declined to review petitioner's  
19 cumulative-error claim when the claim was not presented during the state-court appeals). It follows  
20 that such a claim is also subject to procedural default. Because Blake did not present Claim Thirteen  
21 to the state court until his second state post-conviction proceeding, it is procedurally defaulted.

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24 <sup>5</sup> Claim Two alleges ineffective assistance counsel due to counsel’s failure to obtain expert  
25 assistance. Claim Five alleges various errors and omissions that constituted ineffective assistance of  
26 counsel at trial. Claim Seven alleges various trial court errors. Claim Nine alleges errors in relation to  
jury instructions.

1                   3. *Martinez v. Ryan*

2           Blake argues that he can show cause and prejudice under *Martinez v. Ryan*, 132 S.Ct. 1309  
 3 (2012), to excuse any applicable procedural defaults. The Court in *Martinez* held that ineffective  
 4 assistance counsel (IAC) in a post-conviction review (PCR) proceeding may establish cause for the  
 5 procedural default of a trial IAC claim if the PCR proceeding was petitioner's first opportunity to  
 6 raise the trial IAC claim. *Martinez*, 132 S. Ct. at 1315. The Court stressed, however, that its holding  
 7 was a "narrow exception" to the rule in *Coleman v. Thompson* that "an attorney's ignorance or  
 8 inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural  
 9 default." *Id.* The Court also took care to point out that the exception does not extend beyond claims  
 10 that counsel was ineffective at trial. *See id.* at 1320.

11           Like the Arizona system at issue in *Martinez*, the first opportunity for a prisoner in Nevada to  
 12 raise a trial IAC claim is the initial-review collateral proceeding. *See Brown v. McDaniel*, 331 P.3d  
 13 867, 872 n.4 (Nev. 2014) ("We note that because Nevada requires that [trial IAC] claims be raised  
 14 in a post-conviction petition rather than on direct appeal, . . . the equitable rule from *Martinez* will  
 15 apply to Nevada state petitioners in federal habeas proceedings.") The Ninth Circuit has explained  
 16 the showing a petitioner must make to take advantage of *Martinez*:

17                   Where, as here, the state criminal justice system satisfies the characteristics  
 18 required by *Martinez*, the petitioner must make two related showings about the  
 strength of his particular IAC claim to excuse its default.

19                   First, the IAC claim must be "a substantial one, which is to say that the  
 20 prisoner must demonstrate that the claim has some merit." *Martinez*, 132 S.Ct. at  
 21 1318. Thus, there must be a substantial showing of a "reasonable probability that, but  
 22 for counsel's unprofessional errors, the result of the proceeding would have been  
 23 different." *See Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80  
 24 L.Ed.2d 674 (1984). "A reasonable probability is a probability sufficient to undermine  
 confidence in the outcome." *Id.* When a defendant challenges a death sentence such  
 as the one at issue in this case, the question is whether there is a reasonable probability  
 that, absent the errors, the sentencer . . . would have concluded that the balance of  
 aggravating and mitigating circumstances did not warrant death." *Id.* at 695, 104  
 S.Ct. 2052.

25                   Second, a petitioner must show that "appointed counsel in the initial-review  
 26 collateral proceeding, where the claim should have been raised, was ineffective under

the standards of *Strickland v. Washington*.” *Martinez*, 132 S.Ct. at 1318. Construing *Martinez*, we have held that, to fulfill this requirement, a petitioner must show not only that PCR counsel performed deficiently, but also that this prejudiced the petitioner, i.e., that “there was a reasonable probability that, absent the deficient performance, the result of the post-conviction proceedings would have been different.” *Pizzuto v. Ramirez*, 783 F.3d 1171, 1178 (9<sup>th</sup> Cir. 2015) (quoting *Clabourne v. Ryan*, 745 F.3d 362, 367 (9<sup>th</sup> Cir.), *proceedings suspended and mandate stayed* (Apr. 2, 2014), *and overruled on other grounds by McKinney v. Ryan*, 813 F.3d 798, 818 (9<sup>th</sup> Cir. 2015) (en banc)). Although the prejudice at issue is that in PCR proceedings, this is a recursive standard. It requires the reviewing court to assess trial counsel's as well as PCR counsel's performance. This is because, for us to find a reasonable probability that PCR counsel prejudiced a petitioner by failing to raise a trial-level IAC claim, we must also find a reasonable probability that the trial-level IAC claim would have succeeded had it been raised.

*Runnigeagle v. Ryan*, 825 F.3d 970, 982 (9<sup>th</sup> Cir. 2016) (footnote omitted).

As an initial matter, this court rejects Blake's attempts to argue *Martinez* allows him to overcome the procedural default of claims that are not based on ineffective assistance of counsel. *See Pizzuto v. Ramirez*, 783 F.3d 1171, 1177 (9<sup>th</sup> Cir. 2015) (explaining that the Ninth Circuit has "not allowed petitioners to substantially expand the scope of *Martinez* beyond the circumstances present in *Martinez*"); *Hunton v. Sinclair*, 732 F.3d 1124, 1126-27 (9<sup>th</sup> Cir. 2013) (denying petitioner's claim that *Martinez* permitted the resuscitation of a procedurally defaulted *Brady* claim, holding that only the Supreme Court could expand the application of *Martinez* to other areas). Claims Six, Seven, Nine (except for Nine(A)(ii)), Ten, and Eleven are not IAC claims. Thus, any procedural default of those claims (or sub-claims) cannot be excused based on ineffective assistance of PCR counsel.

Blake argues that the Ninth Circuit has already determined that PCR counsel was ineffective for the purposes of establishing cause for the procedural defaults of Claims One, Two, Three, and Four. Blake points to the Ninth Circuit's finding that ineffective assistance of PCR counsel served as good cause to grant him a stay under *Rhines v. Weber*, 544 U.S. 269 (2005). ECF No. 139, p. 19-22 (citing to *Blake*, 745 F.3d at 982-84). In a footnote, the court indicated that Blake had met the “*Coleman* showing of cause.” *Blake*, 745 F.3d at 983 n.7. In this court's view, the court of appeals determined only that Blake had shown that PCR counsel's *performance* met the *Strickland* standard.

1 It did not assess whether Blake suffered *Strickland* prejudice in his PCR proceeding. In addition, the  
 2 opinion in *Blake* appears to be focused only on the trial IAC claim in Claim Two of Blake’s petition.  
 3 *Id.* at 979 (“In his amended petition, [Blake] argued for the first time that, among other things, his  
 4 trial counsel was ineffective for failing to discover and present to the jury evidence of Blake's abusive  
 5 upbringing and history of mental illness.”). Thus, Blake overstates the scope of the court’s decision.

6 Ultimately, the question whether *Martinez* allows Blake to overcome the procedural default of  
 7 his trial and appellate IAC claims depends upon the merit of those claims.<sup>6</sup> Rather than address that  
 8 issue here, the court will defer its *Martinez* decision until the merits of those claims are briefed in  
 9 respondents' answer and petitioner's reply brief. The procedurally defaulted claims to which *Martinez*  
 10 arguably applies are Claims One, Two, Three, Four, Five, Nine(A)(ii), and Twelve(B).

#### 11 4. Cognizability

12 Respondents argue that Claims Four, Five, and Twelve contain allegations that are not  
 13 cognizable in a federal habeas action – specifically, allegations of ineffective assistance of post-  
 14 conviction counsel. Blake concedes that this argument is meritorious. Thus, the court shall dismiss  
 15 the allegations at issue.

16 Respondents also argue that Claim Fourteen is not cognizable to the extent it alleges a  
 17 violation of the Nevada Constitution. Here again, Blake agrees and abandons that portion of the  
 18 claim.

### 19 III. Motion for Evidentiary Hearing

20 Blake requests an evidentiary hearing to demonstrate cause and prejudice sufficient to  
 21 overcome any procedural default with regard to individual claims. As noted above, the court shall  
 22 first address whether the underlying ineffective assistance of counsel claims are meritorious.  
 23 Accordingly, Blake's motion for an evidentiary hearing shall be denied without prejudice.

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24 <sup>6</sup> Although the Court in *Martinez* appeared to limit its holding to claims that counsel was  
 25 ineffective at trial, the Ninth Circuit has expanded the doctrine to include claims that counsel was  
 26 ineffective on direct appeal. *Nguyen v. Curry*, 736 F.3d 1287, 1295 (9th Cir. 2013).

1           **IT IS THEREFORE ORDERED** that respondents' motion to dismiss (ECF No. 130) is  
2 GRANTED in part and DENIED in part.

3           Claim Fourteen of Blake's second amended petition (ECF No. 124) is denied to the extent  
4 Blake claims that his death sentence is invalid under constitutional guarantees of freedom of  
5 information and a reliable sentence and violates the First and Fifth Amendment. The remaining  
6 federal law theories of relief are properly before the court.

7           The court dismisses, as procedurally defaulted, Claims Six(A,B,D, and E), Seven(B, C, D1.2,  
8 D2, F, H, I, K), Nine (except Nine(A)(ii) and Nine(F)), Ten, Eleven, and Thirteen. Claims  
9 Two(A), Three, Five(G), Seven(A, D1.1, D1.3, E, J), Nine(F), and Twelve(A) are procedurally  
10 defaulted only as to the aspects of the claims found unexhausted prior to Blake's second state post-  
11 conviction proceeding (see ECF No. 77) or as discussed above.

12           The IAC claims in One, Two(B-F), Four, Five(A-F, H-J), Nine(A)(ii), and Twelve(B) are also  
13 procedurally defaulted. The court reserves judgment as to whether petitioner can demonstrate cause  
14 and prejudice to overcome the default of those claims.

15           Allegations of ineffective assistance of post-conviction counsel in Claims Four, Five, and  
16 Twelve and the alleged violation of the Nevada Constitution in Claim Fourteen are dismissed as not  
17 cognizable in a federal habeas proceeding.

18           **IT IS FURTHER ORDERED** that respondents shall have **sixty (60) days** from the date this  
19 order is entered within which to file an answer to petitioner's remaining grounds for relief.

20           **IT IS FURTHER ORDERED** that, in all other respects, the order entered May 11, 2015  
21 (ECF No. 123), remains as the schedule for further proceedings in this case.

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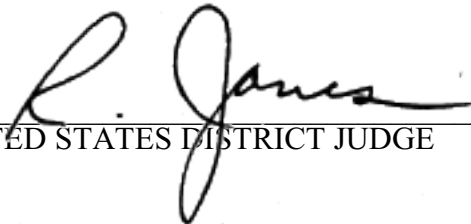
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1           **IT IS FURTHER ORDERED** that petitioner's motion for an evidentiary hearing (ECF No.  
2 141) is denied.

3           DATED: September 28, 2016.

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UNITED STATES DISTRICT JUDGE